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No. A-895

IN THE

Supreme Court of the United States

October Term, 1980

RAYMOND R. GALLAGHER,

Petitioner,

v.

CHRYSLER CORPORATION

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Questions Presented	v
Statement of the Case	i
Reasons for Not Granting the Writ	3
Conclusion	17

APPENDIX

Plaintiff's Motion for Rehearing (February 17, 1977)

TABLE OF AUTHORITIES

Cases: *Page*

Abrams v. Carrier Corp., et al., 434 F2d 1234 (2d Cir. 1970), cert. denied 401 US 1009 (1971) 8, 10

Barbarino v. Anchor Motor Freight, Inc., 421 FSupp 1003 (W.D. N.Y. 1976) 9

Barrett v. Craven County Board of Education, 70 FRD 466 (E.D. N.Car. 1976) 15

Butler v. Teamsters Local 823, 514 F2d 442 (8th Cir. 1975), cert. denied 423 US 924 (1975) 8, 10

Cassell v. Michaux, 240 F2d 406 (D.C. Cir. 1956) 13

Cold Metal Processors v. McLouth Steel Corp., 126 F2d 185 (6th Cir. 1942) 15

Curry v. Chrysler Corp., United Autoworkers of America, Local 7, C.A. No. 76-70385 (1977) 9

Curtis Publishing Co. v. Butts, 351 F2d 702 (7th Cir. 1965) aff'd, 388 US 130, 87 SCt 1975, 18 LEd2d 1094 (1967) 14

DeArroyo v. Sindicator De Trabajadores Packinghouse, AFL-CIO, 425 F2d 281 (1st Cir. 1970), cert. denied, 400 US 877 (1970), reh. denied, 400 US 953 (1971) 8, 9, 10

DeLorto v. United Parcel Service, Inc., 401 FSupp 408 (D. Mass. 1975) 9

Derr v. Bright, 297 FSupp 12 (M.D. Penn. 1969) 8

Echols v. Chrysler Corp., International Union, United Auto Workers of the Local 212, C.A. No. 670661 (1976) . 9

Gainly v. Brotherhood of Packing & Steamship Clerks, 303 F2d 716 (3d Cir. 1962) 13

Gallagher v. Chrysler Corporation, 613 F2d 167 (6th Cir. 1980) 3

Geordano v. McCartney, 385 F2d 154 (3d Cir. 1967) 15

Ginsberg v. Stern, 242 F2d 379 (3d Cir. 1957) 13

Glick v. White Motor Co., 458 F2d 1257 (3d Cir. 1972) 13

Glowacki v. Motor Wheel Corp., 67 MichApp 448, 241 NW2d 240 (1976) 4, 9

Page

Grant v. Mulville Bros. Motor Service, Inc., 428 FSupp 45 (W.D. Ill. 1976) 8
Gray v. Dukedom Bank, 216 Fed 108 (6th Cir. 1954) 13
Hill v. Aro Corp., 275 FSupp 482 (N.D. Ohio 1967) 9
International Nikoh Corp. v. H. K. Porter Co., 374 F2d 82 (7th Cir. 1967) 15
International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Hoosier Cardinal Corp., 383 US 696, 86 SCt 1107, 16 LEd2d 192 (1966) 4, 9, 10
J. E. Riley Investment Co. v. Commissioner of Internal Revenue, 311 US 55, 61 SCt 95, 85 LEd 26 (1940) 15
Jaffke v. Dunham, 352 US 280, 77 SCt 307, 1 LEd2d 314 (1957) 15
Johnson v. Colts, Inc., 306 FSupp 1076 (D. Conn. 1969) .. 8
Kelly v. Delaware River Joint Commission, 187 F2d 93 (3d Cir. 1951) 13
Keohane v. Swarco, 320 F2d 108 (6th Cir. 1954) 13
Kinnunen v. American Motors Corp., 56 FRD 102 (E.D. Wis. 1972) 8
Kirkland v. Cooper, 438 FSupp 808 (D.C. S.C. 1977) 15
Market v. Swift and Co., 173 F2d 517 (2nd Cir. 1949) 13
Morin v. Buick Motor Division of General Motors Corp., et al., 78 LC ¶11,321 (E.D. Mich. 1976) 9
Nugent v. Yellow Cab Co., 295 F2d 794 (7th Cir. 1961), cert. denied, 369 828 (1962) 13
Paine & William v. Baldwin Rubber Co., 113 F2d 840 (6th Cir. 1940) 15
Parks v. "Mr. Ford", 68 FRD 305 (E.D. Penn. 1975) 13
Roach v. Sligman, 412 FSupp 521 (E.D. Penn. 1976) 15
Sanderson v. Ford Motor Co., 483 F2d 102 (5th Cir. 1973) 8, 10
Smart v. Ellis Trucking Co., 380 F2d 215 (6th Cir. 1978), cert. denied, 490 US 958 (1979) 9

Page

Snowden v. D. C. Transit System, Inc., 454 F2d 1047 (D.C. Cir. 1972) 14
Vac-Air Inc. v. John Mohr & Sons, Inc., 471 F2d 231 (7th Cir. 1973) 12
Vaca v. Sipes, 386 US 188, 87 SCt 903, 17 LEd2d 842 (1967) 6
Washington v. Chrysler Corporation and UAW/CIO, Local 51, et al., 68 MichApp 324, 242 NW2d 781 (1976) . 9
Woodham v. American Cytoscope Co. of Pelham N.Y., 335 F2d 551 (5th Cir. 1964) 12

Statutes:

Labor Management Relations Act, §301, 29 USC §185 2, passim
Michigan Compiled Laws Annotated, §600.5805(7) and (8) 5

Other Authorities:

Rule 59(e) Federal Rules of Civil Procedure 12, 13
Rule 60(b) Federal Rules of Civil Procedure 12, 13, 14
Rule 56(e) Federal Rules of Civil Procedure 15
Local Court Rule IXA USDC, Eastern District of Michigan 14
Moore's Federal Practice, Vol. 3 ¶15.07[2] p. 855 .....
Moore's Federal Practice, Vol. 6A ¶¶59.12 and 59.04 13
Moore's Federal Practice, Vol. 7 ¶¶60.18[8], 60.19, 60.28[3], 60.30 ..... 14, 15

QUESTIONS PRESENTED

I.

WHERE AN EMPLOYEE FILES SUIT PURSUANT TO §301, 29 USC §185, AGAINST HIS EMPLOYER FOR WRONGFUL DISCHARGE AND AGAINST HIS UNION FOR BREACH OF ITS DUTY OF FAIR REPRESENTATION, AND THE STATE STATUTE OF LIMITATIONS FOR SUCH LAWSUITS; AS TO BOTH THE EMPLOYER AND UNION DEFENDANTS IS THREE YEARS, IS IT ERRONEOUS FOR THE COURTS BELOW TO APPLY SAID STATUTE OF LIMITATIONS TO THE EMPLOYEE'S CLAIMS AGAINST DEFENDANTS?

II

IS THERE A DIVERSITY OF OPINION BETWEEN THE FEDERAL CIRCUIT COURTS OF APPEALS AS TO WHETHER, IN ACTIONS BROUGHT UNDER §301, 29 USC §185, THE FEDERAL COURTS SHOULD APPLY THE MOST APPROPRIATE STATE STATUTE OF LIMITATIONS?

III

MUST THE DISTRICT COURT'S DISMISSAL OF PLAINTIFF'S CAUSE OF ACTION AGAINST THE EMPLOYER DEFENDANT BE AFFIRMED NO MATTER WHAT DETERMINATION IS MADE AS TO WHAT STATUTE OF LIMITATIONS SHOULD BE APPLIED TO SAID CAUSE OF ACTION?

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STATEMENT OF THE CASE

On December 6, 1971, petitioner (hereinafter plaintiff) was discharged from the employment of respondent (hereinafter defendant) for bringing a revolver into defendant's plant in violation of company rules.

A grievance was filed protesting plaintiff's discharge by plaintiff's Union, Local 372, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and processed to the third state of the grievance procedure where it was withdrawn without prejudice by the UAW due to the fact plaintiff was aware of defendant's rule against bringing firearms into the plant and that defendant's policy of discharging employees for violation of the aforementioned rule had been upheld by numerous arbitration decisions.

On February 13, 1976, plaintiff commenced this action seeking lost wages and reinstatement in the United States District Court for the Eastern District of Michigan. The jurisdiction of the District Court was invoked under §301 of the Labor Management Relations Action of 1947, 29 USC §185 (hereinafter §301). In his Complaint, plaintiff alleged that defendant had breached the collective bargaining agreement between defendant and the union by discharging plaintiff without just cause. Plaintiff also joined in the suit the Local Union and the International Union alleging the union breached its duty of fair representation when it withdrew its grievance from arbitration.

On January 25, 1977, District Judge Philip Pratt filed a Memorandum Opinion and Order Granting Defendant's Motion for Summary Judgment. (See Petitioner's Appendix, page 27.) This Order was based on three grounds. Initially, the existing Federal law required that the appropriate state statute of limitations be applied to actions brought under §301 and that the Michigan three year limitations period had been determined by Michigan Courts as applicable to such actions; and therefore, plaintiff's claim was barred as to both defendants. Additionally, since plaintiff filed no affidavits with his brief in opposition to defendants' Motion for Summary Judgment, defendants' affidavits were unrebutted and had to be considered true for purposes of the motion. Based upon defendants' unrebutted affidavits, the District Court found that plaintiff's claims was also barred because the union did not breach its duty of fair representation and that plaintiff failed to pursue and exhaust his internal union remedies.

Plaintiff filed a Motion for Rehearing. On April 1, 1977, the District Court denied said motion. Initially, the Court recognized that said motion was not in compliance with the Local Rule 1X-A governing motions for rehearing. However, the District Court nevertheless made a determination that the plaintiff's affidavit belatedly filed with his Motion for Rehearing

failed to set forth any conduct of defendant union which would constitute a breach of its duty of fair representation.

Plaintiff appealed to the United States Court of Appeals for the Sixth Circuit from the Order of Dismissal of defendant and the denial of plaintiff's Motion for Rehearing. On January 22, 1980, the Court of Appeals affirmed the judgment of the District Court (p. 20 of Petition in the Appendix, *Gallagher v. Chrysler Corporation*, 613 F2d 167 (1980)). The Court held that the same statute of limitations applied to both plaintiff's claim against defendant and against the union and that the applicable state statute of limitations is specifically determined by Michigan Courts was the Michigan three year statute of limitations for personal injury actions.

REASONS FOR NOT GRANTING THE WRIT

The decision of the courts below to apply the most applicable state statute of limitations to plaintiff's claim against defendant is completely in accord with existing precedent established by this Court. There is no diversity of opinion with regard to this issue between the Circuit Courts of Appeal, although these courts have come to different conclusions as to the time limitations actually applied since different states have different limitation periods. Finally, even a ruling by this Court that the courts below used the wrong statute of limitations would not change the ultimate disposition of this case since there were other grounds upon which the District Court's dismissal must be upheld.

A

The Sixth Circuit Court of Appeals and the District Court Below Properly Ruled that Plaintiff's Claim of Wrongful Discharge Against his Employer is Governed by the Michigan Three Year Limitations Period.

Plaintiff mischaracterizes the decision of the courts below as judicial legislation creating a uniform statute of limitations for

§301 actions against an employer and actions for breach of the duty of fair representation against a union. Such a misinterpretation completely ignores the context in which this issue was decided from the standpoint of the law in effect and the state in which this case arose.

Since §301 of the Labor Management Relations Act has no limitations period provided within the Act itself, it was necessary for the Supreme Court to formulate a rule by which an appropriate limitations period could be made applicable to such actions. Such a rule was formulated in *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Hoosier Cardinal Corp.*, 383 US 696, 86 SCt 1107, 16 LEd2d 192 (1966). The Court held in that case that the timeliness of such a suit "is to be determined, as a matter of Federal law, *by reference to the appropriate state statute of limitations*". (pp. 704-5, emphasis added) After establishing this general principle, this Court went on to set forth the rule by which the appropriate state statute of limitations is to be selected:

> "We agree that the characterization of this action for the purpose of selecting the appropriate state limitations provision is ultimately a question of federal law. (citations omitted). But there is no reason to reject the characterization that state law would impose unless that characterization is unreasonable or otherwise inconsistent with national labor policy." (citations omitted) p. 706

The courts below ruled in accordance with the above directive of this Court. The highest court of record in the State of Michigan which has addressed this issue is the Michigan Court of Appeals in the case of *Glowacki v. Motor Wheel Corp.*, 67 MichApp 448, 241 NW2d 240 (1976). In that case plaintiff's Amended Complaint alleged that her employer wrongfully discharged her in violation of the contract, and that the union breached its duty of fair representation to her by failing to process plaintiff's grievance in a timely fashion. Although it is not

specifically stated in the Court of Appeals Opinion that this was an action under §301, it is clear from the Opinion that the Court treated this case as such an action since it relied on a number of Federal decisions under §301 for precedential authority. Plaintiff filed her Complaint four years after her termination. Both defendants moved for dismissal based upon the Michigan three year statute of limitations. Plaintiff apparently argued that the Michigan six year statute of limitations for contract was applicable to her cause of action. The statutes in question read as follows in pertinent part:

> "600.5805 Injuries to person or property
>
> "Sec. 5805. No person may bring or maintain any action to recover damages for injuries to persons or property unless, after the claim first accrued to himself or to someone through whom he claims, he commences the action within the periods of time prescribed by this section.
>
> * * *
>
> "(7) The period of limitations is 3 years for all other actions to recover damages for injuries to persons and property. P.A. 1961, No. 236, §5805, Eff. Jan. 1, 1963.
>
> "600.5807. No person may bring or maintain any action to recover damages or sums due for breach of contract, or to enforce the specific performance of any contract unless, after first accrued to himself or to someone through whom he claims, he commences the action within the periods of time prescribed by this section.
>
> * * *
>
> "(8) The periods of limitation is six years for all other actions to recover damages or sums due for breach of contract."

As to the union, the Court followed those Federal decisions holding that an action for breach of a union's duty of fair representation sounded primarily in tort and held that the Michigan three year limitation period for injuries to the person or property applied. With regard to the employer, the Court then went on to hold that:

> "[17,18] In summary, we agree with plaintiff that there are two separate claims which comprise plaintiff's complaint. We further agree with plaintiff that in suits for breach of the duty of fair representation the governing period of limitations is the state statute which most directly applies (*International U.U.A.A. & A.I.W. v. Hoosier Cardinal Corp.*, 383 US 696, 705, 86 SCt 1107, 1113, 16 LEd2d 192 [1966]) and that the two claims are so intimately related as to require the same period of limitation to apply to both. Strong reasons of public policy exist for applying the same period of limitations to both actions. We disagree that the applicable state statute is six years. The recent decision of this Court in *Stringer*, supra, clearly points to the application of the three year statute."

This holding is neither unreasonable nor inconsistent with Federal policy. Indeed, it is plaintiff's position that two different limitation periods should apply to the union and employer respectively, which is inconsistent with Federal policy. Under plaintiff's theory, the employer could be sued by the employee with the Court having no jurisdiction over the union. In *Vaca v. Sipes*, 386 US 188, 87 SCt 903, 17 LEd2d 842 (1967), this Court alluded that it would frown on such a situation when it stated there would be no sense to "a rule which would permit a court that has litigated the fault of employer and union to fashion a remedy only with respect to the employer?" *Vaca* at p. 187. Furthermore, at footnote 12 the Court stated:

> ". . . These remedy problems are difficult enough when one tribunal has all parties before it; they are impossible if two independent tribunals, with different independent tribunals, with different procedures, *time limitations*, and remedial powers, must participate." (emphasis added) at p. 188

Admittedly, these statements by the Supreme Court were made with regard to an issue somewhat different than that under consideration here, but the problems noted above which were of concern to the Court are just as apparent here if plain-

tiff's theory is allowed to prevail. Because of the fact that an employee must first prove that the union breached its duty of fair representation to him as a prerequisite to maintaining an action against his employer for breach of the collective bargaining agreement, *Vaca v. Sipes*, supra, the interdependency of the action against the union and the action against the employer is extensive. Furthermore, if liability is found against the two defendants, damages must be allocated between them. Certainly if the union is not a party to the action because of the passage of a limitations period applicable to it, the proceedings are severely handicapped and the employer is placed in the most unfair position of having to defend the adequacy of the union's representation as well as the claim of breach of the collective bargaining agreement. This is unfair to the employer because it does not necessarily know all of the pertinent factors that concern the determination made by the union as to the processing of a particular employee's grievance. While this can, to some extent, be ameliorated by discovery, it is far from an adequate remedy. The employer is not going to be familiar with the internal union procedures, practices and personalities (a very important factor in such cases) which compose the circumstances surrounding the representation of an employee. The only way our adversary system can be properly and fully effectuated in a §301 action is to make the union a party and give it a vested interest in bringing forth all facts which tend to show an employee was given fair representation. Indeed, if the union is not a party and is immune from liability, it has no reason to cooperate with the employer in order to show that the employee was fairly represented and has many reasons not to cooperate since by not doing so it is aiding a constituent in acquiring a recovery from the employer which the union was unable to acquire during the grievance proceeding.

It is because of these aforementioned difficulties which result in the plaintiffs, in the great majority of §301 cases, bringing an action against both the employer and the union. In those rare

cases where the union is not named as a party defendant, the court will normally order that the union be joined as a defendant. *Kinnunen v. American Motors Corp.*, 56 FRD 102 (E.D. Wis. 1972); *Johnson v. Colts, Inc.*, 306 FSupp 1076 (D. Conn. 1969); see also *Derr v. Bright*, 297 FSupp 12 (M.D. Penn. 1969). Such procedural practices destroy, as a practical matter, plaintiff's argument at page 15 of his Petition that the applicable statute of limitations should not depend upon the presence or absence of a party since the union will in the normal course of events always be a party defendant in such actions.

While one circuit has clearly, albeit reluctantly, rejected the above discussed considerations and found that two different statutes of limitations should apply to the actions by an employee against his union and his employer under §301, even that Circuit suggested that Congress should correct the problems attendant to such a scheme by enacting a uniform limitations period for §301 actions. *DeArroyo v. Sindicato De Trabajadores Packing, AFL-CIO*, 425 F2d 281 (1st Cir. 1970) at pp. 286 and 287, cert. denied, 400 US 877 (1970). The Fifth Circuit followed the First Circuit in *Sanderson v. Ford Motor Co.*, 483 F2d 102 (5th Cir. 1973). The other Courts which have addressed this issue, however, found that an identical limitations period for both the union and the employer is necessary to properly effectuate federal policy in the area of labor relations. *Abrams v. Carrier Corp., et al.*, 434 F2d 1234 (2d Cir. 1970), cert. denied 401 US 1009 (1971); *Butler v. Teamster Local 823*, 514 F2d 442 (8th Cir. 1975), cert. denied, 423 US 924 (1975); and *Grant v. Mullville Bros. Motor Service, Inc.*, 428 FSupp 45 (N.D. Ill. 1976). The distinctive feature between the cases cited immediately hereinbefore and the instant case is that the aforementioned decisions applied the longer contract statute of limitations to both the employer and the union rather than the shorter personal injury statute of limitations. The reason for this, however, is readily apparent. There was no shorter personal injury limitations period which could be interpreted

under the existing state law to apply to the action against the employer. In the matter at bar, however, the existing law of Michigan applies the shorter personal injury limitations period specifically to actions against the employer for breach of the collective bargaining agreement when coupled with an action against the union for breach of its duty of fair representation. *Glowacki v. Motor Wheel Corp.*, supra; *Smart v. Ellis Trucking Co.*, 580 F2d 215 (6th Cir. 1978), cert. denied, 440 US 958 (1979); see also *Washington v. Chrysler Corporation and the UAW/CIO Local 51, et al.*, 68 MichApp 374, 242 NW2d 781 (1976). Thus, state law has characterized the action for the purpose of selecting the appropriate limitations period. This characterization is in harmony with Federal policy not only for the reasons discussed above but also because the shorter limitations period facilitates the Federal goal of a relatively rapid disposition of labor disputes. Indeed, whenever possible, the Federal Courts, when given a choice, are inclined to select the shorter limitations period to effectuate that goal. *Hossier*, supra at p. 707, *DeArroyo v. Sindicato De Trabajadores Packing AFL-CIO*, supra at 287, *Barbarino v. Anchor Motor Freight, Inc.*, 421 FSupp 1003 (WD NY 1976) at p. 1006, applying a ninety day limitations period to an action to overturn an arbitration award; *DeLorto v. United Parcel Service, Inc.*, 401 FSupp 408 (D.Mass. 1975); *Hill v. Aro Corp.*, 275 FSupp 482 (N.D. Ohio 1967). *Morin v. Buick Motor Division of General Motors Corp., et al.*, 78 LC ¶11,321 (E.D. Mich. 1976).

It is apparent from the foregoing that the Courts below were correct when it selected the Michigan three year limitations period to apply to an action brought under §301 of the Labor Management Relations Act against the employer and the union. The decisions below are consonant with the standards set forth in *Hoosier* and the Federal labor policy. Finally, it should be noted that other decisions of the United States District Court for the Eastern District of Michigan have ruled, prior to the Sixth Circuit's decision in this case, that the three year

limitations period applies to the action against the employer as well as the union in such suits. *Curry v. Chrysler Corporation, United Autoworkers of America, Local 7*, C.A. No. 76-70385 (1977) and *Echols v. Chrysler Corporation, International Union, United Auto Workers and the Local 212*, C.A. No. 670661 (1976).

From the foregoing, it is clear that the Sixth Circuit has not arbitrarily created a uniform statute of limitations for actions brought under §301 against an employer and for breach of the duty of fair representation against a union. Nor has it turned a §301 action against an employer into an action for breach of duty of fair representation as suggested by plaintiff at pages 10 and 11 of his Petition. Clearly, the four reasons set forth at pages 11 and 12 of said Petition supposedly to demonstrate why such an alleged metamorphosis is contrary to Federal labor policy have no relevance to the issue at hand since they are set forth to support a fallacious premise.

For the reasons stated above, this Petition should be denied.

B

There is No Diversity of Opinion Between the Courts as to What Statute Of Limitations to Apply in a §301 Lawsuit

In an attempt to demonstrate to this Court that there is a diversity of opinion between the Circuit Courts of Appeal as to what state statute of limitations to apply, plaintiff has paraded a number of decisions on page 17 of his brief in which the same statute of limitations was applied to both the union and the employer, *Abrams v. Carrier Corp.*, supra, and *Butler v. International Brotherhood of Teamsters, Local 283*, supra, or in which different limitations periods were applied, *DeArroyo v. Sindicato De Trabajadores Packing AFL-CIO*, supra, and *Sanderson v. Ford Motor Co.*, supra.

Yet, all of these cases recognized the law of *UAW v. Hoosier Cardinal Corp.*, supra, that the *Federal Courts are to apply the*

most appropriate state statute of limitations in actions brought under §301. However, the various circuits developed different opinions as to the characterization of the actions for the purpose of selecting the appropriate state limitations provision. The cardinal distinction between all of the other cases which addressed this issue and the instant case is that there was no state law which specifically characterized the action against the employer under §301 and the action against the union for breach of the duty of fair representation for the purpose of applying the appropriate state statute of limitations. In this case, the law of the State of Michigan, through its Court of Appeals, has done just that, and the Courts below in this matter have not seen fit to reject that characterization finding it neither unreasonable nor inconsistent with national labor policies for the reasons discussed in Part A hereof.

Therefore, accepting plaintfiff's Petition for Certiorari would not resolve any differences between the Circuit Courts of Appeals as to how, in the absence of characterization by state law, to characterize suits filed against the employer under §301 and suits against the union for the breach of duty of fair representation since that is not the issue in the instant matter before the Court.

C

Even if This Court Finds That The Courts Below Applied The Wrong Statute of Limitations to Plaintiff's Action Against Defendant the Dismissal of Plaintiff's Action By The District Court Must Still Be Sustained

Initially, it should be noted that the motions of defendants Chrysler Corporation and the UAW for Summary Judgment and supporting affidavits were not resisted by any opposing affidavits filed on behalf of plaintiff at the time of hearing. Thus, the District Court had to consider the facts set forth in the affidavits submitted by the UAW and Chrysler Corporation as true for the purposes of those motions. The District Court found

that based on those affidavits that there was no genuine issue of material fact which would support a finding that the union breached its duty of fair representation. After the District Court issued its opinion and order granting defendant's Motion for Summary Judgment, the plaintiff filed a motion for rehearing. Since plaintiff filed his Motion for Rehearing *after* a judgment had been rendered, that motion must be considered to have been brought pursuant to Rule 59(e) or Rule 60(b) of the FRCP. Rule 59(e) reads as follows:

> "(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 60(b) reads in pertinent part as follows:

> "(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken . . ."

While Rule 59(e) speaks of a "motion to alter or amend" a judgment it is also intended to encompass motions to vacate a judgment. *Vac-Air, Inc. v. John Mohr & Sons, Inc.*, 471 F2d 231 (7th Cir. 1973); *Woodham v. American Cytoscope Co. of*

Pelham, N.Y., 335 F2d 551 (5th Cir. 1964); *Gainley v. Brotherhood of Railway and Steamship Clerks*, 303 F2d 716 (3rd Cir. 1962); and *Market v. Swift & Co.*, 173 F2d 517 (2d Cir. 1949). See *Moore's Federal Practice*, Vol. 6A, ¶59.12[1] at pp. 59-250. Plaintiff's Motion for Rehearing necessarily entails a request that the Court vacate its original judgment in order to allow a rehearing. Thus, after a matter is dismissed without leave to amend and a judgment is entered, any request for amendment of the pleadings should be allowed only after the plaintiff moves for relief under Rules 59(e) or 60(b). *Gisberg v. Stern*, 242 F2d 379 (3d Cir. 1957); *Cassell v. Michaux*, 240 F2d 406 (D.C. Cir. 1956); *Kelly v. Delaware River Joint Commission*, 187 F2d 93 (3d Cir. 1951), cert. den., 342 US 812, 72 SCt 25, 96 LEd 614 (1951); *Market v. Swift & Co.*, supra and *Parks v. "Mr. Ford"*, 68 FRD 305 (E.D. Pa. 1975). See *Moore's Federal Practice*, Vol. 3, ¶15.07[2] at page 855.

Since Rule 59(e) requires that a party serve such a motion not later than ten days after the entry of the judgment and plaintiff in the instant matter filed his motion on February 17, 1977 (which was served on defendant Chrysler Corporation on February 22, 1977) which was twenty three days subsequent to the entry of the January 25, 1977 judgment, he is precluded from filing a motion under 59(e). *Keohane v. Swarco*, 320 F2d 429 (6th Cir. 1963). *Gray v. Dukedom Bank*, 216 F2d 108 (6th Cir. 1954) and *Market v. Swift & Co.*, supra. This time period cannot be enlarged by the Court as is indicated by Rule 6(b), not even by agreement of the parties, *Nugent v. Yellow Cab Co.*, 295 F2d 794 (7th Cir. 1961) cert. denied, 369 US 828, 82 SCt 844, 7 LEd2d 793 (1962). See *Moore's Federal Practice*, Vol. 6A, ¶59.12 at pp. 59-251 and 59-253. If, however, a motion is filed which is untimely under Rule 59(e) but nevertheless sets forth the elements which are cognizable under Rule 60(b), it should be heard pursuant to latter rule. *Glick v. White Motor Co.*, 458 F2d 1287 (3d Cir. 1972). See *Moore's Federal Practice*, Vol. 6A ¶59.04[4] at p. 59-26. Furthermore, the fact

that plaintiff did not label his motion as one brought under Rule 60(b) does not change its character, and it should be treated as such a motion. *Snowden v. D.C. Transit System, Inc.*, 454 F2d 1047 (D.C. Cir. 1972). See also *Moore's Federal Practice*, Vol. 7, ¶¶60. 18[8] at p. 216.1, 60.28[3] at p. 407.

Having established that plaintiff's Motion for Rehearing is governed by the standards of Rule 60(b), it is now necessary to ascertain if said motion had any merit.

As can be seen from the above-quoted Rule, a party moving under Rule 60(b) must set forth one of the six reasons set forth therein to be relieved of a final judgment. An examination of plaintiff's Motion for Rehearing (Defendant's Appendix page herein) will readily reveal that he set forth no reason cognizable under Rule 60(b) to justify the relief requested. Plaintiff's only attempt to justify his motion is set forth in paragrah 2 therein where he vaguely asserts that he was not able to file his brief in a timely fashion due to circumstances beyond his control. He gives no reason whatsoever as to why no opposing affidavit was filed either prior to or at the time of the hearing on defendant's Motion for Summary Judgment.

In addition to the foregoing, plaintiff's Motion for Rehearing was not filed in a timely fashion under Local Rule 1X-A of the Federal District Court for the Eastern District of Michigan. This rule requires the motions for rehearing be filed within twenty days after judgment is entered. (Plaintiff's Appendix pp. 24 and 25) Notwithstanding these defects, the Court below disposed of plaintiff's motion on the merits and denied his Motion for Rehearing.

Plaintiff's Amended Notice of Appeal seeks review of both the lower Court's Order and Judgment granting defendant's Motion for Summary Judgment and the Opinion and Order denying Appellant's Motion for Rehearing.

The standard of review with regard to a lower court's decision on a Rule 60(b) motion is whether the lower court abused its discretion in denying plaintiff's motion. *Curtis Publishing*

Co. v. Butts, 351 F2d 702 (7th Cir. 1965) aff'd 388 US 130, 87 SCt 1975, 18 LEd2d 1094 (1967), *International Nikoh Corp. v. H. K. Porter Co.*, 374 F2d 82 (7th Cir. 1967) and *Geordano v. McCartney*, 385 F2d 154 (3d Cir. 1967). See also *Moore's Federal Practice*, Vol. 7, ¶¶60.19 at pp. 227 and 228, and 60.30[1] at p. 419. Clearly, the Court below did not abuse its discretion in denying plaintiff's Motion for Rehearing given the above-mentioned deficiencies of said motion. Furthermore, it is axiomatic that *a decision of a lower court must be sustained if there are any grounds in the record to support that decision even though those other grounds were not relied on by the lower court in making its determination. Jaffke v. Dunham*, 352 US 280, 77 SCt 307, 1 LEd2d 314 (1957); *J. E. Riley Investment Co. v. Commissioner of Internal Revenue*, 311 US 55, 61 SCt 95, 85 LEd 26 (1940); *Cold Metal Processors v. McLouth Steel Corp.*, 126 F2d 185 (6th Cir. 1942); *Paine & Williams v. Baldwin Rubber Co.*, 113 F2d 840 (6th Cir. 1940).

Certainly the procedural deficiencies of plaintiff's Motion for Rehearing were in themselves sufficient reason to deny plaintiff's motion, and the Court below clearly did not abuse its discretion in denying that motion.

Since plaintiff's Motion for Rehearing was properly denied, plaintiff's belated affidavit, submitted therewith, cannot be considered to have been before the Court below when it granted defendant's Motion for Summary Judgment. When a motion for summary judgment is made and supported by affidavits (as was the case here), a plaintiff may not rest upon the mere allegations or denial of his pleadings but must bring forth, by affidavit or otherwise, specific facts showing the existence of a genuine issue of fact for trial. Federal Rules of Civil Procedure Rule 56(e) *Kirkland v. Cooper*, 438 FSupp 808 (D.C. S.C. 1977); *Roach v. Sligman*, 412 FSupp 521 (E.D. Penn. 1976); *Barrett v. Craven County Board of Education*, 70 FRD 466, (E.D. N. Car. 1976).

There is no question that plaintiff failed to comply with this rule in opposing the Motion for Summary Judgment of Chrysler Corporation and the UAW. Plaintiff cannot claim that at the time of hearing there was sufficient evidence before the Court to show any genuine issues of fact as to whether the union breached its duty of fair representation.

Therefore, even if the issue upon which this Petition is based is resolved in plaintiff's favor, it will not change the outcome of this case.

CONCLUSION

It is respectfully submitted that the ruling below should be sustained. Both the District Court and the Sixth Circuit rendered decisions which were congruent with the existing Federal labor law and policy.

The actual holding of the courts below is not in conflict with the determinations made in other circuits due to the fact that the Statute of Limitations applied to the employer was that which the law of the State of Michigan applies to employers in such actions.

Finally, even if this Court were to agree with plaintiff's position as to what constitutes the appropriate Statute of Limitations to apply in this matter, that would not change the ultimate disposition of plaintiff's case.

Therefore, for the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,
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APPENDIX

Motion for Rehearing

MOTION FOR REHEARING
(Filed February 17, 1977)

Now comes Plaintiff, RAYMOND R. GALLAGHER, by and through his attorneys GLOTTA, ADELMAN, DINGES, DAVIS, MIDDLETON, RILEY & MURPHY, P.C., and states as follows:

1. That on January 25, 1977, this Court issued its Memorandum, Opinion and Order granting Defendants' Motions for Summary Judgment.

2. That due to events beyond the control of Plaintiff's counsel the Plaintiff's brief was untimely presented to this Court and therefore Plaintiff's counsel was not allowed oral argument on January 24, 1977.

3. That Plaintiff respectfully submits that this Court's Memorandum, Opinion and Order is in error in several respects and the Plaintiff's authorities cited in his brief should be brought to the attention of this Court.

4. That this Motion for Rehearing is supported by the affidavit of the Plaintiff, RAYMOND R. GALLAGHER.

5. That concurrence in the relief requested was asked of Defendants' counsel but declined.

Glotta, Adelman, Dinges, Davis,
Middleton, Riley & Murphy, P.C.

By: (s) Robert J. Dinges (P 12799)
Attorney for Plaintiff
1529 Broadway - 4th Floor
Detroit, Michigan 48226
Phone: 964-1190

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

ROBERT J. DINGES, being first duly sworn, deposes and says that he is attorney of record for RAYMOND R. GALLAGHER, that he has read the foregoing MOTION FOR REHEARING, by him subscribed, and that he knows the contents thereof, and that the same is true of his own knowledge based upon the records and file except as to those matters therein stated to be upon information and belief, and as to those, he believes is to be true, and he believes that the MOTION FOR REHEARING should be granted.

(s) Robert R. Dinges (P 12799)

Subscribed and sworn to before me this 16th day of February, 1977.

(s) Naomie Williams
Notary Public, Wayne County, Michigan
My Commission Expires: July 2, 1978